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No. 97-889

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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CEASAR WRIGHT,

*Petitioner*,

v.

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Was the court below correct in holding -- contrary to this Court's decisions in *Alexander v. Gardner-Denver Co.* and other cases, particularly *Barrentine v. Arkansas-Best Freight Co.*, and *McDonald v. City of West Branch*, -- that a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute?

## PARTIES TO THE PROCEEDINGS

The parties are Ceasar Wright, Petitioner, and Universal Maritime Service Corp., Stevens Shipping & Terminal Company, Stevedoring Services of America, Ryan-Walsh, Inc., Strachan Shipping Company, Ceres Marine Terminals, Inc., and South Carolina Stevedores Association, Respondents. None of the corporate Respondents is a publicly held corporation or a subsidiary of a publicly held corporation, according to disclosures filed by Counsel for Respondents in the court below.



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## BRIEF FOR PETITIONER

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is referenced in a Table at 121 F.3d 702 (July 29, 1997), and is reprinted at Petition for Certiorari, Appendix ("Pet. App.") 1a.

The Order of the United States District Court for the District of South Carolina, dated September 25, 1996, is unreported, and is reprinted at Pet. App. 6a. That Order adopted the ruling recommended by a Magistrate Judge in a Report dated June 14, 1996, reprinted at Pet. App. 19a. The further Order of the District Court, dated December 5, 1996, is reprinted at Pet. App. 14a.

The decision of the United States Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 432 (1996), on which the courts below relied without discussion, is reprinted, for convenient reference, at Pet. App. 34a.

## JURISDICTION

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This matter involves the enforcement of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* The pertinent portions of the Act, particularly 42 U.S.C. §§ 12117 (adopting 42 U.S.C. § 2000e-5(f)), 12212, are printed at Pet. App. 27a. This matter also involves 29 U.S.C. §§ 173(d) and 185.

## STATEMENT OF THE CASE

*A. Petitioner's Employment History*

Petitioner was regularly employed as a longshoreman in the Port of Charleston, beginning in 1970, through the hiring hall operated by Local 1422, International Longshoreman's Association, AFL-CIO (ILA). His taxable income from this employment exceeded $82,000 in 1991. Joint Appendix ("JA") 51a ¶ 9. In early 1992, while working for respondent Stevens Shipping, petitioner fell off the top of a freight container, shattering his right heel and injuring his back. These injuries disabled him from waterfront employment for an extended period. His treating physician thought petitioner would probably be permanently and totally disabled from longshore employment, while other physicians expressed the opinion that petitioner



could return to waterfront work. JA 50a. In May, 1994, petitioner settled his workers' compensation and other claims, including claims for permanent and total disability, for $250,000. JA 52a.

A major factor in petitioner's physical disability was a bony spike in his right heel that made walking extremely painful. In late 1994 the bony spike spontaneously resorbed. Petitioner's physician documented this improvement and found that petitioner was physically able to return to work. JA 53a.

In January, 1995, after almost three years off the job, petitioner returned to the hiring hall to seek assignments for work. On nine of the ten days from January 2 through January 11, 1995, petitioner was referred for employment by Local 1422, ILA, and worked for four of the respondent employers during those nine days. Each of these respondents accepted petitioner as qualified for his position, and none had any complaints about his work performance. Pet. App. at 21a; JA 54a ¶ 18. Some of these respondents asked for written approval from petitioner's treating physician for petitioner to return to work, and this was provided. JA 53a.

On January 11, 1995, the respondent employers agreed among themselves that they would all refuse to accept petitioner for work. In virtually identical letters to the president of Local 1422, ILA, the respondents stated that petitioner was previously "certified as permanently and totally disabled." They continued that "once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind." JA at 35a.

Petitioner immediately consulted with Benjamin Flowers, the president of Local 1422, ILA, his bargaining representative. As the District Court found, "Both parties agree that Plaintiff initially followed the proper procedure under the collective bargaining agreement for filing a grievance against Defendant." Pet. App. 16a. President Flowers wrote to the respondents to

protest that the refusal to accept petitioner for work was a violation of the Americans with Disabilities Act and a "lockout" violating the bargaining agreement. (The agreement lacked a "nondiscrimination" clause.) The union president did not pursue a grievance for petitioner under the agreement; instead, he advised petitioner to retain private counsel to pursue a statutory claim under the Americans with Disabilities Act. By the time petitioner located counsel, just two weeks later, a grievance under the Bargaining Agreement was "out of time." JA 55a.

Petitioner promptly invoked his statutory rights by filing timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC) against all respondents. After the EEOC issued a Notice of Right to Sue on each charge, petitioner filed this action in January, 1996.

Two months later, the United States Court of Appeals for the Fourth Circuit issued its opinion in the case of *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. March 12, 1996), *cert. denied*, ___U.S. ___, 117 S. Ct. 432 (1996), which held that an applicable labor arbitration agreement "ousts a court of jurisdiction" to hear statutory claims of discrimination brought by individual employees. Petitioner then offered to arbitrate, but respondents refused. JA 58a.

*B. The Collective Bargaining Agreement*

The bargaining agreement in this case was adopted effective November 30, 1990. It was negotiated between the respondents and the South Atlantic & Gulf Coast District of the International Longshoremen's Association to cover "longshore work" in the Port of Charleston, a term that covered "all labor used in connection with loading or discharging ships, barges or other floating craft." JA 36a.[1]

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[1] In addition to a detailed definition of the scope of "longshore work," JA 36a-37a, the agreement addressed job classifications, wage rates, vacation and holiday pay, shift differentials, minimum hours of work after the day shift, special supplementary funds (container royalty and Guaranteed Annual Income), pension and welfare Funds (see Defendants' Motion for Summary Judgment, Exhibit B, Attachment 1); the commitment of the parties to adopt safe and efficient methods for stevedoring operations, JA 37a; the Employer's rights in hiring and discharging workers and assigning workers subject to various limitations, such as the "minimum gang structure" "required as determined by the class of cargo being handled by the gang," detailed matters not defined within the four corners of the collective bargaining agreement, JA 38a; misconduct and punishment for various offenses, JA 39a-42a; a prohibition on lockouts by the Employers and on work stoppages by the union, JA 42a-43a; collection of delinquent Employer contributions to pension and welfare funds, JA 43a; a grievance procedure, JA 43a-45a; and safety rules for various classes of cargo operations, including conditions disqualifying a worker from employment (intoxication and epilepsy). JA 46a-47a.



The grievance and arbitration provisions were stated in Clause 15.(b) of the Agreement. That Clause did not define "grievances," except as "Matters under dispute which cannot be promptly settled between the Local and an individual Employer." JA 43a. Clause 15.(F) of the Agreement [known as a "zipper clause"] stated that the Agreement represented closure of negotiations, JA 45a - 46a:[2]

> The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement.

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[2] A "zipper clause" defines, not the scope of arbitration, but the scope of the employers' exemption from participating in "mandatory bargaining" during the life of the collective bargaining agreement." *International Union v. Murata Erie North America*, 980 F.2d 889, 903 (3d Cir. 1992).

All past port practices being observed may be reduced to writing in each port.

The Agreement also provided in Clause 15(E): "All interpretations of this Agreement will be made in accordance with the provisions of Clause 15." JA 45a. As to construction of the Agreement, the parties also adopted a "savings clause," Clause 17, that states: "It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." JA 47a.

Although the bargaining agreement covered many topics, it did *not* include a "nondiscrimination" clause: the agreement includes no express provisions whatever prohibiting discrimination by the Employers on the basis of race, gender, age, nationality, or disability. The Agreement makes no reference whatsoever to the Americans with Disabilities Act, nor to any other employment discrimination law. JA 55a ¶ 21. The only specific statute to which the Agreement refers is the Occupational Safety and Health Act. JA 46a.

In the Port of Charleston, there are three local unions (ILA affiliates with distinct work jurisdictions) and a number of other Employers who contract with one or more of these locals. When Local 1422, ILA, and an individual Employer have a "matter under dispute," the Agreement contemplates that they will have "such discussion" as may "promptly settle" the dispute.[3] If the parties cannot achieve a resolution, the "Matters under dispute . . . shall, no later than 48 hours after such

[3] The Agreement mentions explicitly several types of issues that will be referred to the Port Grievance Committee if the parties cannot resolve them. These include (1) safe and efficient methods of operation, JA 37a-38a; (2) a claim of "hardship . . . because of unreasonable or burdensome conditions." JA 38a; (3) "where work methods or operations materially change in the future," *id.*; (4) "misconduct charges" against individual workers, JA 42a; and (5) contributions allegedly delinquent to pension and welfare funds (referred directly to District Grievance Committee). JA 42a.



discussion, be referred in writing covering the entire grievance to a Port Grievance Committee" consisting of two representatives of Management and two representatives of the union. The grievance may be settled at the Port level. JA 43a-44a.

Only if "this Port Grievance Committee cannot reach an agreement within five days after receipt of the complaint" can the matter "be referred to the Joint Negotiating Committee, which will function as a District Grievance Committee . . . ." JA 44a. The Joint Negotiating Committee has five members from Management and five members from the Union. JA 45a. When sitting as the District Grievance Committee, the meeting must be attended by at least three (3) regular Employer members and three (3) regular Union members and each side has four votes. JA 44a.

The Agreement further provides, JA 44a-45a:

> A majority decision of this [District Grievance] Committee shall be final and binding on both parties and on all employers signing this Agreement. In the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case, it shall employ a professional arbitrator. . . .
>
> In the selection of an arbitrator, thought will be given to a person who is knowledgeable and familiar with the problems of the Longshore industry.
>
> Any decision in favor of the employee involving monetary aspects of discharge shall require the employer involved to make financial restitution from the time of the complaint concerned, whereas decisions involving working methods or interpretations shall take effect seventy-two hours after being rendered.

*C. Claim under the Americans With Disabilities Act*

The petitioner's union received virtually identical letters from four stevedoring companies, all stating, "Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind." JA 35a. This statement, petitioner believes, was an unusually clear violation of the Americans with Disabilities Act.

A major purpose of the ADA is to ensure that employment decisions are based on an individualized determination of a person's actual abilities and limitations. The Act protects "individuals with a disability," and defines a disability as: "(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Among the ADA's specific prohibitions are: (a) "limiting . . . or classifying a job applicant or employee in a way that adversely affects . . . opportunities," and (b) "utilizing standards or criteria that have the effect of discrimination on the basis of disability. . . ." 42 U.S.C. §§ 12112(b)(1), (b)(3)(A). Respondents' letters constitute an admission that petitioner was being permanently barred from his occupation because he was regarded as being "permanently and totally disabled." They also evidenced discrimination based on a "record" of disability, utilizing both an impermissible "limitation or classification" and "standards or criteria" that screen out people with disabilities.



*D. Proceedings Below*

On cross motions for summary judgment, a Magistrate Judge recommended that petitioner's suit "be dismissed without prejudice for want of jurisdiction," on the authority of *Austin*. Pet. App. at 26a. The District Judge agreed in an Opinion dated September 25, 1996. He later denied a timely Motion for Reconsideration by Order dated December 5, 1996.[4]

Since the employers had already refused to arbitrate the claims, the dismissal of the suit without either compelling arbitration or retaining jurisdiction ended the statutory claims. The result is that petitioner has been permanently excluded from his career occupation without having a hearing in any forum on the merits of his ADA claims.

Petitioner prosecuted a timely appeal to the Court of Appeals. That Court affirmed the judgment on July 29, 1997, holding that Wright's only recourse was a union-sponsored grievance, and that he had no right to sue under the ADA. The Court referred to the arbitration clause, but quoted instead from the "zipper clause," 15(F):

> The arbitration clause at issue is particularly broad. The clause states that the "Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment."

Pet. App. 4a. After confusing the zipper clause with the

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[4] In July, 1996, after the decision in *Austin v. Owens-Brockway Glass Container*, the union hiring hall again referred petitioner for work. Petitioner was again refused work. This time the union pursued a grievance. Respondents refused to process the grievance. The union filed suit to compel arbitration. *Local 1422, ILA, AFL-CIO v. S.C. Stevedores Association, et al.*, C.A. No. 2:97-2886-21 (D.S.C. filed Sept. 22, 1997). Because the union's suit was not filed within six months of January 11, 1995, when the petitioner was first refused work, the suit has been dismissed as untimely. The union has appealed to the Fourth Circuit, Docket No. 98-1296.

arbitration clause, the Court continued,

> An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that a plaintiff was required to submit his ADEA claim to arbitration where the arbitration agreement covered "any dispute, claim or controversy." *Id.* at 23. The language of the CBA at issue in this case is equally broad, covering "all matters" regarding "terms and conditions of employment." This language easily encompasses Wright's ADA claim.

A timely petition for certiorari was granted on March 2, 1998.

## SUMMARY OF ARGUMENT

The Americans with Disabilities Act is one of many Congressional enactments that guarantee minimum substantive rights to all individual workers covered by each statute. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that these substantive statutory rights were independent of labor agreements and found that these rights could be enforced judicially, either in addition to or instead of contract remedies.

For organized workers only, Congress created a parallel statutory regime promoting and regulating the exercise of collective economic rights, including the "core" collective right, the right to strike. Two statutes regulate collective activity. The NLRA created the National Labor Relations Board as an independent federal agency to oversee labor organizing and collective bargaining. The LMRA created a system of "industrial self-government" in which unions exchanged the right to strike, when disputes arose, for the right to have an independent private tribunal make a final and binding resolution



of disputes about the "interpretation or application" of the labor agreement.

Statutes conferring individual rights emphasize "make whole" relief for the individual worker, whether or not he is covered by any labor agreement. Under the NLRA and the LMRA, statutes conferring collective rights, remedies are available for individuals, but are subordinated to the purposes of "national labor policy," with the primary objective of promoting industrial peace.

The LMRA established the binding authority of the grievance-arbitration mechanism for resolving disputes about the application or interpretation of labor agreements. The Railway Labor Act did the same for railroads and airlines. Those mechanisms were not created to resolve disputes involving the "minimum substantive rights" guaranteed to workers by employment discrimination statutes, and parties to labor agreements do not generally intend to use the grievance mechanism for that purpose, except where they explicitly agree otherwise. In particular, most unions, like the union representing petitioner, do not wish to undertake the conflicting interests inherent in being a "gatekeeper" for the statutory rights of individuals under employment discrimination statutes.

Logically, the enforcement of statutory rights by individuals who seek personal "make whole" relief should be controlled by those individuals. In contrast, access to remedies for workers under the NLRA is controlled by the General Counsel of the NLRB, through his discretionary authority to issue unfair labor practice complaints. Access to remedies for workers under "industrial self-government" is controlled by unions, as the official representatives of the collective economic power of those workers. In this context, only the control of enforcement of statutory rights by the injured worker is properly analogous to commercial arbitration.

In the securities industry's arbitration regime, the Securities and Exchange Commission enforces standards for arbitration, and no employee risks forfeiting rights because of any special procedural rules of that regime. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that, on the record there presented, the industry arrangements were adequate to assure effective vindication of statutory rights to be free of age discrimination.

In stark contrast, if statutory claims are subject to "final and binding" resolution under labor grievance procedures, union control of the grievance mechanism and the technical rules of that mechanism can easily combine, as in this case, to prevent strong claims from ever receiving a hearing on the merits. Both union control and extremely short periods for filing claims are well suited as an extension of collective bargaining to adjust contract disputes. To transform those grievance mechanisms to protect statutory rights, such as by recognizing the statutes of limitations enacted by Congress, would undermine the effectiveness of the grievance mechanism as part of the continuing process of bargaining.

Congress has never authorized unions to waive any individual "minimum substantive rights" -- including the right to a judicial forum -- under any employment discrimination statute: in enacting the ADA, Congress explicitly endorsed *Alexander*; the Federal Arbitration Act does not apply to this agreement; and this Court has repeatedly rejected arguments that Section 301 of the LMRA requires arbitration of claims under federal statutes.

*Alexander v. Gardner-Denver* controls this case. Since remedies under labor agreements are primarily intended to further national labor policy, the grievance-arbitration procedures for enforcing those remedies are very different from commercial arbitration and give individual workers much less opportunity to enforce statutory rights than is provided in



commercial arbitration. *Gilmer* and the cases it applied have no relevance to labor grievance mechanisms. The decision of the court of appeals should be reversed and the case remanded for petitioner to proceed on the merits of his claim under the ADA.

## ARGUMENT

### *Introduction*

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), established a "bright-line" rule: a mandatory arbitration clause in a labor agreement does not bar an employee's access to the courts to prosecute a claim based on a federal statute because, *inter alia*, the union, rather than any individual employee, controls the exercise of the grievance-arbitration procedure under a collective bargaining agreement and any individual's "waiver" of the judicial forum would have to be "voluntary and knowing." The principles of *Alexander* were amplified in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), which held that wage and hour claims under the Fair Labor Standards Act, 29 U.S.C. § 206(d), were not precluded by a decision of a joint labor-management dispute board, and that other workers who did not file grievances could go directly to federal court. This Court also applied these principles in *McDonald v. City of West Branch*, 466 U.S. 284 (1984), which held that a First Amendment claim brought in federal court under 42 U.S.C. § 1983 was not barred by an unfavorable decision in an arbitration of a grievance filed under a bargaining agreement.

In *Alexander*, even as this Court emphasized the importance of the right of ultimate resort to the judicial forum to address statutory claims, the Court also endorsed the use of contractual procedures to resolve disputes through application of the bargaining agreement, 415 U.S. at 55:

> . . . the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive

> and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee, . . . eliminat[ing] those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

After *McDonald*, this Court decided that statutory claims were presumed to be within the scope of predispute agreements for mandatory arbitration in commercial and securities agreements, and were to be enforced under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (the "*Mitsubishi* Trilogy").

Then in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court applied the *Mitsubishi* Trilogy and the Federal Arbitration Act to require arbitration of a claim under the Age Discrimination in Employment Act where a registration statement executed by a securities broker required arbitration of disputes. The Court carefully distinguished that individual agreement, which left the individual employee with control of the prosecution of his claims before the arbitrator, from the collective bargaining context, where the arbitrator's authority was usually limited and the union (not the aggrieved employee) controlled the presentation of the claim. Three years later, in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), this Court reaffirmed the principle that workers' statutory rights were not to be waived for them by a union contract.

The unique policy considerations governing labor arbitration clauses have been recognized by every federal court



of appeals to address the issue since *Gilmer*, with the exception of the court below.[5] These policy concerns arise from the three parallel, sometimes overlapping regimes created by Congress to regulate employee-employer relationships in the organized shop. First, in the National Labor Relations Act (Wagner Act) (1935), 29 U.S.C. §§ 151, *et seq.*, Congress authorized labor organizations that obtained majority worker support to be the exclusive bargaining representative in a workplace and established an independent agency, the National Labor Relations Board, to adjudicate disputes about the union's exercise of collective economic rights and the employer's opposition to union influence. Second, in Titles II and III of the Labor Management Relations Act (Taft-Hartley Act) (1947), 29 U.S.C. §§ 171, *et seq.*, Congress endorsed an exclusive system of "industrial self-government," in which disputes between the parties about the application of the bargaining agreement ("grievances") would be resolved by the parties or by a private umpire -- an arbitrator, a joint labor-management council -- with virtually no court review of the umpire's decisions. Third, in a wide variety of statutes addressing the rights of workers, including pay and freedom from discrimination, Congress provided "minimum substantive guarantees to individual workers." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981).

These parallel regimes had very different purposes. The two labor relations statutes were designed to regularize and legitimize the exercise of the collective economic power of workers (NLRA) and to establish labor peace by creating an institutional mechanism to resolve disputes about collective rights under the bargaining agreement ("grievances") without the continual disruption of strikes or other job actions (LMRA). Although remedies for individual workers were created in both these regimes, these remedies were strictly circumscribed. The

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[5] See cases cited, Petition for Certiorari at 10.

General Counsel for the NLRB has virtually unreviewable discretion as to whether to issue a complaint on an unfair labor practice charge. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Both collective regimes were primarily directed at the implementation of collective rights and "national labor policy," not at the protection of the rights of individual workers. See, e.g., *Local 391 v. Terry*, 494 U.S. 558, 573 (1990) (NLRA "concerned primarily with the public interest in effecting federal labor policy"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); and *Vaca v. Sipes*, 386 U.S. at 191 (LMRA contemplates union will supervise the grievance process and "settle grievances short of arbitration.").

On the other hand, federal statutes that guaranteed rights both to organized workers and to individual, unrepresented employees, were intended by Congress to "provide minimum substantive guarantees to all employees." The courts' remedial powers under these statutes, such as Title VII, were designed to provide "make whole" relief to the individual worker. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). These rights are personal, and have never been considered to be within the authority of the labor organization. Based on the individual character of statutory protections against discrimination and based on the strong Congressional policy against union waivers of rights of the workers they represent, *Alexander* should be reaffirmed. All three distinctions this Court noted in *Gilmer* support this result: (1) the union and management did not agree to grieve statutory claims; (2) due to majoritarian control, the union should not have authority to waive or compromise personal statutory rights; and (3) no statute authorizes a union-management agreement to abrogate personal judicial remedies. In addition, the grievance mechanism



here, as in most labor agreements, is not suited for effective vindication of personal statutory rights.

## I. By statute, tradition, function, and intention, "grievances" under a labor agreement, including the agreement here, are limited to disputes about the application of the collective bargaining agreement.

Petitioner's representative did not intend that the bargaining agreement would be used to process statutory claims. Benjamin Flowers, the president of Local 1422 who wrote letters of protest to the employers and advised petitioner to retain an attorney to sue under the ADA, was the union representative who had signed the bargaining agreement. JA 47a; Plaintiff's Motion to Compel Arbitration, Exhibits 2, 3, 4. The agreement has never been applied to a statutory discrimination claim. Statement of respondents' counsel, Transcript of Hearing on Motion for Summary Judgment, May 22, 1996, page 51, line 13.

In *Gilmer*, 500 U.S. at 35, this Court correctly observed that the controversy was completely different from the *Alexander* line of cases, "since the employees there had not agreed to arbitrate their statutory claims and the labor arbitrators were not authorized to resolve such claims. . . ." This limitation is often expressly stated in bargaining agreements, but it derives from the Congressional declaration that the function of the grievance-arbitration process is to apply the bargaining agreement.

The generic meaning of "grievance" as limited to the application of the bargaining agreement was enacted in 1947 in Section 203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d):

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of *grievance disputes arising over the*

> *application or interpretation of an existing collective bargaining agreement. . . .* [Emphasis added.]

As this Court observed in *United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987):

> Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances.

This understanding of "grievances" is also congruent with parallel labor statutes. This Court has held that "grievances," as used in the Railway Labor Act, is "a synonym for disputes involving the application or interpretation of a CBA." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 255 (1994) (state law "whistleblower" claim not subject to the statutory grievance procedure for "minor disputes" and National Adjustment Board). Before *Norris*, this Court had unanimously held that claims under federal statutes are not subject to the statutory grievance procedure for "minor disputes" and the Adjustment Board. *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987) (FELA).[6]

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[6] As noted *infra* , pp. 47-48, the statutory procedure is completely independent of the contract mechanism. This Court has never required "exhaustion" of contract dispute procedures before presenting a statutory claim, either under the Railway Labor Act, see *Buell*, or under Section 301. See *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 357 (1971) (grievance not prerequisite to seaman's statutory wage and penalty claim under 46 U.S.C. § 596); *McKinney v. Missouri-Kansas-Texas R. Co.* 357 U.S. 265, 268-70 (1958) (contract grievance not prerequisite to suit asserting seniority rights under Universal Military Training and Service Act). In most of the appellate cases that have rejected *Austin*, no grievance was filed. See cases cited, Pet. at 10 (*Varner, Harrison, Brisentine, Tran*). *Alexander* and subsequent cases make clear there is no "exhaustion" requirement. See 415 U.S. at 47 and *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (grievance does not "toll" the statutory time for filing a claim under Title VII).



Because of this consistent interpretation by Congress and this Court of the term "grievance" in the grievance-arbitration mechanism, the labor grievance process is completely different from the sophisticated commercial arbitration mechanism described in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 n.18, 638 n.20 (1985), and it is substantially different from commercial arbitration in the securities industry, the arbitral regime this Court applied to Mr. Gilmer's claim under the ADEA. The wide gulf between labor arbitration and commercial arbitration was described in the *Steelworkers* Trilogy, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 580-81 (1960):

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.
>
> * * * * *
>
> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their

solution in a way which will generally accord with the variant needs and desires of the parties.[7]

It is crucial to remember that the *parties to the labor grievance* are the District Union, the Employers' Association, and the individual employer(s). JA 36a, 47a. The individual workers are not parties.[8] Individuals on either the labor side or the management side can request that a "matter in dispute" about the application of the agreement be submitted to the grievance process, but, for a worker, only the union can formally

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[7] Because the written agreement here has apparently evolved by accretion over many years, it is a collection of provisions that are applied year in and year out by permanent industry committees. The first step in the grievance process is a "Port Grievance Committee"; the union representatives come from several distinct local labor organizations in the Port (ILA locals with distinct work jurisdictions). If the "matter under dispute" is not resolved at the Port level, "the written record of the dispute shall be referred to the Joint Negotiating Committee, which will function as a District Grievance Committee. . . ." JA 44a.

At either level, if a majority develops for a disposition of the grievance, the matter ends there. Period. Neither the local union nor the particular employer involved in the dispute can appeal from a majority vote. No arbitrator enters the picture unless the industry committees deadlock at both the Port level and the District level.

The Seniority Board Agreement has no relevance to an *employer's* refusal to hire (as opposed to a gang leader or header refusing to hire). If it did, the complaint process under the Seniority Board Agreement is even more truncated. The Seniority Board is composed of two union representatives and two Employer representatives. JA 48a-49a. A determination by a majority of the Board is "final and binding." If the Board "shall be unable to reach a determination of a particular dispute, the dispute shall be submitted to a committee of two [one union and one management, both from outside the Port of Charleston] for final determination." If these committee members deadlock, the grievant has no further appeal.

[8] The Fourth Circuit's assertion in *Austin* that the worker was a "party" was a fundamental error in that court's premise from which the majority reasoned to an erroneous conclusion. 78 F.3d at 883 n.2.



initiate and proceed with a "grievance" through the grievance mechanism.

Thus, the grievance mechanism is limited to application of the agreement, unless the parties clearly define a "grievance" to include alleged violations of rights deriving from public law. Violations of discrimination statutes were defined as "grievances" in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879-80 (4th Cir.) ("This Contract shall be administered in accordance with the applicable provisions of the Americans With Disabilities Act. . . . any disputes under this Article as with all other Articles of this contract shall be subject to the grievance procedure."), *cert. denied*, ___ U.S. ___, 117 S. Ct. 432 (1996). Only specific language like that found in *Austin* could enable union and management to submit an individual worker's claim of a violation of a federal statute to grievance-arbitration.

This Court's decisions under Section 301 have consistently taken this approach. (See *infra* Argument IV.C.) Both in *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988), and *Livadas v. Bradshaw*, 512 U.S. 107 (1994), as well as in earlier cases, the Court has held that labor agreements do not require arbitrating state law claims that do not depend on interpreting the bargaining agreement, unless the agreement expresses a "clear and unmistakeable" intent to submit such claims to arbitration. Such intent is never found.

The court below thus erred in interpreting the general grievance provisions of the labor agreement to require arbitration of petitioner's federal statutory ADA claim.

## II. Because the collective bargaining process is designed to be controlled by the majority, the rights of victims of discrimination cannot be waived by a bargaining representative, and the union here did not intend to waive those rights.

In *Alexander*, in discussing why the award made by an arbitrator who had heard the contract claim was not automatically entitled to deference by the federal court, this Court stated, 415 U.S. at 58 n.19, the concern that individual statutory rights would be compromised in the interest of the majority. The Court observed that "a breach of the union's duty of fair representation may prove difficult to establish." Seven years later, in *Barrentine*, this Court relied on the potential for compromise of individual rights as the first reason for denying preclusion to the decision of the joint union-management council that denied a grievance stating a wage claim. 450 U.S. at 742. Continuing to today, the concern that the majority will decide to forego a valid individual statutory claim has been a principal reason this Court has refused to allow grievance-arbitration remedies in labor agreements to supplant judicial remedies for violation of federal statutes. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Gilmer*, 500 U.S. at 35 (1991); *Livadas*, 512 U.S. at 127 n.21 (1994).

These concerns dictate that imprecise language in bargaining agreements should not be construed as waiving minority rights. (See cases under Section 301, *infra*, IV.C.)

The risk of majority waiver in pursuing an individual claim is substantial. The negotiations that lead to the terms of the bargaining agreement (the pre-dispute agreement that respondents assert waived petitioner's judicial remedies), present an even greater risk of the majority's compromising minority rights, since the numerous considerations, all at issue at the same time, make it impossible to identify the *quid pro quo* for compromising minority rights.



### A. The union's role derives from its authority to represent workers in exercising the *collective* right to strike, and in exercising the collective rights bargained for in relinquishing the right to strike, not by compromising statutory rights of minorities.

As this Court noted in *Barrentine*, 450 U.S. at 735: "[T]o promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers." The Court had earlier observed in *Alexander*, 415 U.S. at 54, "The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike," citing *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970). *See also, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). The union is not permitted to negotiate away the rights of a protected minority in return for concessions that benefit the majority of workers in the unit. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).

The arbitration clause and the scope of its application must be interpreted consistently with its origins in the union's relinquishing the collective right to strike, and not as a waiver of individual rights to which workers are entitled under federal statutes applicable to those workers as individuals.[9] The Fourth Circuit's view, as stated in *Austin*, 78 F.3d at 885, confuses the fundamental nature of the collective bargain -- relinquishment of the right to strike as *quid pro quo* for the right to arbitrate disputes under the collective bargaining agreement -- by adding relinquishment of individuals' statutory rights to the mix of

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[9] "Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer." *Alexander v. Gardner-Denver Co.*, 415 U.S. at 52.

concessions, notwithstanding that this Court has never authorized waiver by the union of workers' individual rights.

As this Court observed in *Alexander*, since the union exercises the collective rights of workers, it "may waive certain statutory rights related to collective activity, such as the right to strike." 415 U.S. at 51. But in exercising that exclusive authority, the union cannot discriminate against minorities -- whether the worker be a member of a minority ethnic group; a member of a disadvantaged gender; a worker of an advanced age; a non-member or dissident member of union; or an "individual with a disability." For example, if the union systematically disadvantages minority workers by refusing to process grievances for a class of minority workers, it violates Title VII. *Goodman v. Lukens Steel*, 482 U.S. 656 (1987).

As discussed in *Alexander* and *Barrentine*, many federal employment statutes are "designed to provide minimum substantive guarantees to individual workers." 450 U.S. at 737. Congress has clearly stated that the purpose of the Americans with Disabilities Act is to provide such "minimum substantive guarantees" for "*individuals* with disabilities [emphasis added]," in many spheres of social activity, including employment. 42 U.S.C. §§ 12101(a), (b). By the nature of the enactments, all employment discrimination statutes are "designed to provide minimum substantive guarantees," *i.e.*, protection from discrimination, "for individual workers."

As with the Title VII rights discussed in *Alexander*, the "substantive guarantees" to be free from discrimination cannot be waived prospectively. It would defeat the "paramount purpose" of each Congressional enactment to allow an employer or a union -- separately or in concert -- to condition employment on waiver of substantive statutory guarantees -- with the employee left to "take it or leave it." Such a policy would allow sophisticated but unscrupulous business enterprises that are "covered employers" under the terms of the ADA and other



statutes to "opt out" of that coverage by conditioning all jobs on waiver of those rights.

Unions, as well as employers, can violate the ADA. For example, if an employee proposes several options to accommodate his disability, the employer may object to one proposal and the union may object both to that proposal and to all other alternative accommodations requested. The bargaining agreement cannot commit to grievance-arbitration the worker's rights against the union, which has an express conflict. Since the union could not "waive" judicial remedies for claims filed jointly against the union and employer, it should not have the power to waive judicial remedies for any claims. *Compare NLRB v. Magnavox Company*, 415 U.S. 322, 325 (1974). But for this case, the Court need not decide the limits on a union's power to waive individual remedies; the Court need only find that a bargaining agreement that is silent about the issue will not be construed to waive a worker's access to the courts.

### B. The Union's exclusive control of the grievance process makes labor arbitration unsuitable for enforcing minimum statutory standards for individuals.

When this Court decided *Gilmer*, Justice White emphasized that *Alexander* and its progeny, on which petitioner relies, were distinguishable from *Gilmer*, 500 U.S. at 35:

> [B]ecause the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective bargaining representation and individual statutory rights. . . .

This Court has identified two related reasons for this concern: (1) the union often faces conflicting demands, which range from reluctance to accuse management of racism or sexual

harassment, to outright conflicts of interest when the union is charged with discrimination; and (2) the union's decisions about pursuing a grievance can be reviewed only in a suit for breach of the duty of fair representation (DFR), an imprecise and inequitable means of enforcing statutory rights.

**1. Conflicting demands and conflict of interest.**

In *Alexander*, this Court noted, 415 U.S. at 58 n.19:

> In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . Congress thought it necessary to afford the protections of Title VII against unions as well as employers. [Citations omitted.]

Congress also "thought it necessary to afford the protections" of the Americans with Disabilities Act as to unions. 42 U.S.C. § 12111(2). ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee.") Congress has expressly prohibited discrimination by unions in every modern federal employment discrimination statute. *See, e.g.*, 29 U.S.C. § 623(c) (ADEA). The union itself may be guilty of discrimination, either in hiring or admission to membership, or in processing grievances against the employer. *Goodman v. Lukens Steel*, 482 U.S. 656 (1987).

Even if the union does not actively discriminate, it may be inhibited in its response to a statutory claim because other workers in the same bargaining unit are discriminating against the claimant or because other workers resent the relief the claimant seeks. Other workers can create a "hostile work environment" that violates any of the federal anti-discrimination



statutes. While this type of claim is currently most commonly pursued in sexual harassment cases, e.g. *Oncale v. Sundowner Offshore Services, Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1998), and in claims of harassment of a racial or ethnic minority employee, a "hostile environment" can also be created for a worker with a disability protected by the ADA. For example, a union member might reveal that a co-worker is HIV-positive, and the infected employee might be shunned by other workers in the unit.

A related problem appears when the relief sought by the victim of discrimination requires resources the union considers scarce. As this Court observed in *Barrentine*, 450 U.S. at 742:

> a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

Unions may also be reluctant to discuss proposals for "reasonable accommodation" that an individual with a disability requests under the ADA. The National Labor Relations Board has declared that a union's refusal to bargain over a proposed accommodation would violate § 8(b)(3) of the National Labor Relations Act. NLRB Memorandum on Collective Bargaining and ADA (Sept. 1992), reprinted in ADA MAN. (BNA) 70:1021. Uncertainty about the scope of obligations under the ADA makes the union's position especially precarious.

The on-going relationship between the union and the employer may also make the union reluctant to assert claims of discrimination. Allegations of racial discrimination are a "hot-button" issue, which unions often seek to avoid because of the adverse effect such claims have on the bargaining relation. See *Goodman v. Lukens Steel Co.*, 482 U.S. at 667-68 (union asserted it omitted "racial discrimination claims in grievances claiming other violations of the contract . . . because the

employer would 'get its back up' if racial bias was charged, thereby making it more difficult to prevail"). Similarly, a claim of sexual harassment by a supervisor might be so potentially explosive that the union, concerned with everyday contacts with the supervisor, would hesitate to pursue the complaint unless the victim presented overwhelming corroborating evidence.

**2. Unions have wide latitude in handling grievances.**

As this Court observed in discussing the Fair Labor Standards Act claims at issue in *Barrentine*, 450 U.S. at 742:

> even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration.

The union may make such a decision simply on the basis of allocation of its own scarce resources, even if the claim does not initiate conflicting demands within the unit. As another court of appeals observed in rejecting the rationale of *Austin*, in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 294 (1997):

> [T]he union has broad discretion as to whether or not to prosecute a grievance. . . . Corresponding to this expansive and ill-defined discretion, the scope of judicial review of its exercise is deferential. [Citations omitted.] The result is that a worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so. . . .

"[A] breach of the union's duty of fair representation may prove difficult to establish." *Alexander*, 415 U.S. at 58, n.19.

The facts of this case are a particularly compelling example of the difficulty in proving a breach of duty by the



bargaining representative. Petitioner immediately sought the union's assistance. When the matter could not be resolved by initial discussions with the employer, the president of the local union advised petitioner to retain private counsel to pursue his statutory remedies under the ADA, rather than his contract remedies. Since the bargaining agreement lacks any "non-discrimination" clause, the statutory remedies fit the claim more closely. This was not an unusual position for a union to take; compare *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 521 (11th Cir. 1997), where the local union also declined to pursue a contract claim of disability discrimination.

As respondents have repeatedly pointed out, most recently in Respondent's Brief in Opposition to Certiorari, page 14, petitioner has not accused the union of a breach of the duty of fair representation. How could petitioner have possibly prevailed on a DFR claim, which requires proof of arbitrary or discriminatory action by the union? In January, 1995, the union had no notice that the Fourth Circuit would "overrule" *Alexander v. Gardner-Denver Co.*, a year later. It was certainly not arbitrary or irrational for the union to think that petitioner had an administrative and judicial remedy; to this day, every other appellate court has agreed that *Alexander* is still good law, as this Court stated in *Gilmer* and *Livadas*.

As Justice White observed for the court in *Gilmer*, none of the concerns discussed in this section of the argument had any application in that case. But in this case, concerns of majority waiver of minority rights are as fresh and compelling as they were when this Court decided *Alexander*, *Barrentine*, *McDonald*, *Gilmer*, and *Livadas*.

## III. This bargaining agreement, like most labor agreements, does not provide a mechanism for adequately vindicating rights under employment discrimination statutes.

In *Gilmer*, the employer compelled the employee to arbitrate his claims, rather than to sue on the claims in court. Here, the employers have successfully avoided ever defending the claim on the merits. The cursory manner in which the courts below have denied petitioner any hearing on the merits of his ADA claim demonstrates how difficult it is to use labor grievance-arbitration "effectively" to "vindicate a statutory cause of action. . . ."

In *Gilmer*, this court reiterated that an employee seeking statutory remedies cannot be required to "forgo the substantive rights afforded by the statute. . . ." 500 U.S. at 26, quoting *Mitsubishi*, 473 U.S. at 628. Thus, one requirement for enforcement of a compulsory arbitration agreement is that "'the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum. . . .'" 500 U.S. at 28, quoting *Mitsubishi Motors*, 473 U.S. at 637. This Court has also emphasized that if arbitration "clauses operated . . . as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. at 637 n.9. The unique nature of labor grievance mechanisms as "part and parcel of the collective bargaining process," prevent individuals from effectively vindicating causes of action based on statutes that "provide minimum substantive guarantees" for workers.

A major concern expressed by this Court in *Alexander* was that the grievance-arbitration mechanism in labor agreements was not adequate for the determination of statutory claims of employment discrimination. 415 U.S. at 56-58. These concerns remain fresh today even after compulsory arbitration



has extended *commercial* arbitration to statutory claims. *See, e.g., Gilmer*, 500 U.S. at 34 n.5.

Through wholesale modifications, perhaps the labor grievance mechanism could be transformed to adopt the procedures of modern commercial arbitration. But such transformation would either destroy the effectiveness of grievance mechanisms in their current forms, or it would create an acute tension between the limited procedures and rights of workers in adjustment of contract grievances, on one hand, and the more formal, sophisticated procedures to vindicate statutory rights, on the other. The "bright-line" rule of *Alexander* has worked well to preserve the collaborative bargaining processes reflected in existing grievance mechanisms, and also to preserve the judicial forum that Congress adopted for the vindication of statutory rights in employment discrimination cases.

### A. The Grievance Mechanisms are incompatible with vindication of statutory rights.

**Grievances are required to be asserted in extraordinarily short time periods.** The bargaining agreement in this case is typical of labor agreements. An extremely short time is allowed to assert a grievance: "no later than 48 hours after such discussion" if the grievance "cannot be promptly settled." JA 43a. In this case, although petitioner retained an attorney within 15 days, petitioner's ADA claim was already defaulted by the union's failure to pursue the grievance procedures within 48 hours. JA 55a.[10]

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[10] Petitioner argued below that he was entitled to proceed in court because this application of the grievance procedure violated the ADA's 180/300 day statute of limitations for filing charges. The District Court stated, without explanation, Pet. App. 16a: "The Court is not concerned that this procedure unduly limits the time in which an employee has to bring an employment discrimination claim." The Court of Appeals ignored petitioner's argument that he had complied with the statutory time limit.

Congress has extended the time for filing administrative charges to 180 days, 300 days in those states, such as South Carolina, which have state Fair Employment Practices Acts. 42 U.S.C. § 2000e - 5(e)(1), adopted for the ADA in 42 U.S.C. § 12117(a). Enforcing much shorter time limits in the grievance process clearly prevents the "vindication of rights" under employment discrimination statutes, since Congress has mandated the courts "to interpret this [statutory] time limitation so as to give the aggrieved person the maximum benefit of the law. . . ." *See Zipes v. Trans World* Airlines, 455 U.S. 385, 395 (1982); *cf. Graham Oil Co. v. ARCO Products*, 43 F.3d 1244, 1247-48 (9th Cir. 1995) (reducing time for asserting commercial claim from one year to six months, and other limitations, rendered the arbitration clause unenforceable); *Nelson v. Cyprus Baghdad Copper Co.*, 119 F.3d 756, 761 n.8 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3686 (April 20, 1998) (claim under Americans with Disabilities Act); *see also Cole v. Burns Intern. Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

**This agreement does not guarantee access to impartial arbitration.** As discussed above, Section II.B, this Court has consistently been concerned that the worker does not control prosecution of his grievance nor the demand for arbitration. But here the problem of access to arbitration is even more fundamental. Under the bargaining agreement, not even the worker's local union can take a claim to arbitration if the industry committee rejects the worker's claim. Arbitration is available only when the District Negotiating Committee deadlocks on the grievance. JA 44a. For claims before the Seniority Board, that Board's determination is final and binding. There is never any access to an arbitrator. JA 48a.

For statutory claims asserted against the union, or against the union and the employer jointly, the absence of a neutral decision maker is painfully obvious. All members of the joint labor-management grievance committees at the Port level



and the District level represent either an employer or a union affiliated with the allegedly offending union.

For contract claims, such industry boards or committees are completely appropriate, but these boards are inadequate for statutory claims. Nothing in *Gilmer* or the *Mitsubishi* Trilogy authorizes the union to allow such boards to make a final determination on statutory claims of individual workers.

**The worker cannot select counsel of his choice.** As the party to the bargaining agreement, the union controls presentation of the grievance, including choosing the representative. Usually grievances are presented by union officials (local officers or District or International representatives), not by attorneys. See *McDonald v. City of West Branch*, 466 U.S. 284, 290 n.9 (1984). This would be the case under this agreement through the industry grievance committee steps, so that a worker could easily lose his claim in a final and binding denial of a grievance before any attorney ever spoke on his behalf.

Even when an attorney participates, as (s)he would if the arbitration stage were reached under the CBA, the attorney is selected, retained, and instructed by the union, not by the individual worker who has suffered discrimination.

**The full range of statutory remedies is not guaranteed.** In *Gilmer*, this Court assumed that arbitration could only be enforced if the arbitrator could award the full range of statutory remedies; the relevant arbitration rules did not restrict the remedies available. 500 U.S. at 32. Subsequently, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court held that punitive damages could be awarded in securities arbitration.

As to relief to the individual, the bargaining agreement here states only, JA 45a:

> Any decision in favor of the Employee involving monetary aspects or discharge shall require the Employer involved to make financial restitution from the time of the complaint concerned. . . .

The use of the term "restitution" connotes back pay, and possibly fringe benefits, such as contributions to the Pension and Welfare Fund. These remedies "would generally be restitutionary in nature. See *Curtis v. Loether*, [415 U.S. 189], at 197 [(1974)]." *Local No. 391 v. Terry*, 494 U.S. at 572. It is doubtful, at best, whether this agreement contemplates that an arbitrator can award compensatory and/or punitive damages. Traditionally, punitive damages have been available in labor arbitration only where clearly authorized in the agreement. *See, e.g., Baltimore Regional Joint Board v. Welaster Clothes*, 596 F.2d 95, 98 (4th Cir. 1979). The ADA authorizes recovery of both compensatory and punitive damages (42 U.S.C. § 2000e-5(c), adopted by 42 U.S.C. § 12117(a)). Petitioner sought both remedies. JA 20a.

With regard to statutory claims against the union, it would be doubtful that punitive damages could be awarded in the grievance procedure or arbitration. Even in cases where the worker establishes a breach of the duty of fair representation in presenting a grievance, the worker cannot recover punitive damages. *Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979).

**Both industry committees and arbitrators lack competence to resolve statutory claims of employment discrimination.** The labor arbitrator's lack of competence in a complex area of public law has been a significant concern for this Court in the decisions holding that statutory judicial remedies are not superseded by labor arbitration. *Alexander*, 415 U.S. 56-58; *Barrentine*, 450 U.S. at 743; and *McDonald*, 466 U.S. at 290, text at n.9. In decisions like *Gilmer*, revising this Court's view of commercial arbitration, the Court has relied on the Security and Exchange Commission's "broad authority



. . . to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987).

Of course, unlike *Gilmer*, there is no federal agency that establishes, monitors, or maintains standards in the labor arbitration regime. Because of the unique nature of the grievance process (see above, pages 19-21), Petitioner submits that labor arbitrators, on the whole, still lack the competence to resolve complex statutory issues applying the proper presumptions in favor of the protected person as established by federal statute and regulation. For example, the arbitration clause here declares that an arbitrator should be "a person who is knowledgeable and familiar with the problems of the Longshore industry." JA 44a. No intent is declared to select a person knowledgeable about specific public law issues relevant to statutory disputes.

But even if the competence of labor arbitrators has improved in this area, the competence of the joint industry committees and grievance boards has not. In this case, as in *Barrentine* and many other instances, the decision of such a committee or board may be final and binding both on the worker and on the union. Not only are the members of these committees *not lawyers*, compare *McDonald*, 466 U.S. at 290, n.9 (citing to *Alexander* and *Barrentine*), they may have no formal education beyond high school. Their experience in the industry prepares them well to resolve issues of the "application and interpretation of the bargaining agreement." But Committee members with limited formal education are poorly prepared to understand and apply complex statutory standards and presumptions. The increasingly complex nature of employment law makes it hazardous even for a lawyer who is an excellent general practitioner to attempt to present an employment discrimination claim without specialized assistance. If lay union representatives present claims under employment discrimination

statutes to these committees, lay members of industry committees and boards cannot be expected to understand clearly any complex issues.

**Procedural limitations on the grievance and arbitration process make that process inadequate for both adjudication and review of statutory claims.** In *Gilmer*, this Court emphasized the procedural protections in place for commercial arbitration in the securities industry, particularly in light of the oversight role of the Securities and Exchange Commission. In rejecting Mr. Gilmer's objections to arbitration of his ADEA claims, this Court emphasized several procedural protections, including: (1) the rules authorized discovery, though on a limited basis; and (2) the rules required that arbitration awards be in writing and allow public access to awards. 500 U.S. at 31-32. Here there are no rules, and the bargaining agreement reflects no agreement to authorize discovery for the grievance process. Nor are awards required to be issued in writing. Without a written award, it is virtually impossible for the courts "to ensure that arbitrators comply with the requirements of the statute at issue."[11] *Gilmer* at 32 n.4.

Further, the bargaining agreement here reflects no intent to take testimony before the joint industry grievance committees, nor to maintain a written record of the grievance proceedings. In fact, the respective representatives usually present their cases to the industry committees without testimony. Compare the procedure described in *Local No. 391 v. Terry*, 494 U.S. 558, 562 (1990).

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[11] Some decisions in the courts of appeals reviewing arbitration awards in statutory employment claims reflect a standard for judicial review that will correct legal errors only if the arbitrator knew the statutory requirements and intentionally refused to follow them. *E.g.*, *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997). Without a written award, there is no way for a court to review whether the arbitrator violated this standard.



### B. A "duty of fair representation" claim against the union is an inadequate substitute for a claim against the employer.

If a worker must meet the standard to prove "breach of duty of fair representation" (DFR) to obtain a hearing on the merits of a discrimination claim, that requirement is itself "foregoing a substantive right afforded by the statute." In a DFR case, the employee must prove "arbitrary or bad-faith conduct on the part of the Union." *Vaca v. Sipes*, 386 U.S. 171, 193 (1967). This deferential standard protecting unions from liability was adopted by this Court so that "the employer and the union . . . each will endeavor in good faith to settle grievances short of arbitration." *Id.* at 191.

These are valid objectives in administering a private contract, a bargaining agreement, but may have perverse consequences for enforcing statutes that protect individual employees from discrimination.

In addition, under prevailing interpretation of remedies, if the union has breached the duty of fair representation, the union would be solely liable for all of the worker's losses after the time the union's breach caused the losses to continue. *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983). Such a rule would greatly benefit the primary wrongdoer (the employer) who has discriminated against the worker. As in *Bowen*, the employer would be relieved of half or more of its liability for the harm it caused. This allocation of liability would reduce the beneficial effect of statutory remedies in deterring repetition of the violations.

### C. Transforming the grievance process to protect statutory rights would undermine the efficiency of the mechanism in adjusting contract disputes.

In *Alexander*, this Court recognized that it might be possible, if sufficient resources were to be devoted to the project, to bring the practice of labor arbitration up to "a standard that adequately insured effectuation of Title VII rights in the arbitral forum. . . ." 415 U.S. at 59. This Court also recognized that such changes "would tend to make arbitration a procedurally complex, expensive, and time-consuming process." To match the standards approved in *Gilmer*, there would have to be at least (1) some federal agency oversight authority and mechanism; (2) some discovery procedures; (3) systematic written awards analyzing the statutory issues; and (4) a more stringent standard of judicial review to "ensure that arbitrators comply with the requirements of the statute. . . ." 500 U.S. at 31-32. Time limits for filing grievances would have to be relaxed to comply with the time limits established by Congress. The individual worker's right to counsel of his choice would have to be protected.

As observed by the Court in *Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967), to give the individual worker the right to control prosecution of his grievance would increase the number of grievances taken to arbitration: "This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."

These changes would undermine the nature of the labor grievance process as an extension of collective bargaining. To give the individual worker control sufficient to assure protection of his rights would undermine the union's authority to control presentation and resolution of grievances. Such changes would be pernicious; to avoid them, employees need to retain the



option of going to court that they have had since this Court decided *Alexander*.

These problems do not arise under *Alexander*. The worker retains the right to go to court, but has the option -- with the consent of both union and management -- to submit the statutory claim to an arbitrator. Where the submission is optional, the victim of discrimination can use labor arbitration where the procedures and the representative will give him satisfactory protection of statutory rights. See *supra* pp. 13-14.

## IV. No statute creates a national policy that a collective bargaining agreement should supersede the judicial remedies Congress provided to enforce the Americans with Disabilities Act and other statutes prohibiting employment discrimination.

The foregoing arguments show (1) why this labor agreement, like such agreements traditionally, was never intended to extend to statutory claims of employment discrimination; and (2) why institutional arrangements that are well suited to resolve contract grievances are inadequate to assure the protection of rights under employment discrimination statutes. Either of those points is sufficient to resolve this case. More broadly, however, Congress has never authorized a bargaining representative to waive either judicial remedies or the constitutional right to a jury trial.

The Americans with Disabilities Act explicitly provided a judicial forum for the enforcement of the ADA. 42 U.S.C. § 12117, adopting *inter alia* 42 U.S.C. § 2000e-5. In 1991, the remedies available under the ADA for intentional discrimination (as under Title VII of the Civil Rights Act of 1964) were extended to include compensatory and punitive damages and the right to a jury trial. 42 U.S.C. § 1981a(c). That right to a jury trial is grounded in the Seventh Amendment. *Hetzel v. Prince William County, Virginia*, ___ U.S. ___, 118 S. Ct. 1210 (1998).

The courts below held that the grievance-arbitration provisions of the bargaining agreements governing petitioner's hiring hall displaced all judicial remedies provided in the Americans with Disabilities Act. The Court of Appeals specifically relied upon "both the ADA's statutory preference for arbitration, 42 U.S.C. § 12212, and the strong federal policy favoring alternative dispute resolution . . . ." Pet. App. at 5a.

In fact, there are no statutory grounds for the ruling below. The ADA expresses no "preference" for mandatory pre-dispute arbitration agreements. Under *Austin*, the Federal Arbitration Act does not apply to Collective Bargaining Agreements, 78 F.3d at 879, and the respondents have not argued otherwise. Section 301 favors arbitration of contract disputes, but this court has repeatedly ruled, both before and after *Alexander*, that the federal policy favoring arbitration of collective labor disputes does not displace judicial remedies provided to individual workers.

### A. Neither the ADA nor any other federal employment discrimination statute expresses a "preference" for mandatory pre-dispute arbitration agreements.

The issue presented is not whether Congress permitted voluntary post-dispute arbitration for a binding resolution of statutory claims. *Alexander* permitted such arbitration, if the employee voluntarily and knowingly relinquished his judicial remedies, and Congress has encouraged voluntary use of "alternative dispute resolution." The issue is whether Congress has authorized unions to bind workers to pre-dispute agreements for *mandatory* arbitration of statutory claims.

In *Austin*, the Fourth Circuit relied on The Civil Rights Act of 1991, § 118, to conclude that "Congress is in favor of arbitration." 78 F.3d at 881. Two years later, in *Wright*, this "favor" had progressed to a "statutory preference." But it is clear that Congress has never approved *mandatory pre-dispute*



*arbitration agreements*, much less expressed a "statutory preference" for mandatory pre-dispute agreements.

The Fourth Circuit's analysis of Congressional intent rests on its expansive reading of § 118 of the 1991 Amendments to Title VII, a section adopted almost verbatim from § 12212 of the Americans with Disabilities Act. Those statutes provide:

> **§ 12212. Alternative means of dispute resolution**
>
> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under this chapter.

The initial phrase of this section, drafted in 1990 and enacted in two separate Acts in 1990 and 1991, limits ADR techniques to cases "Where appropriate and to the extent authorized by law . . . ." In *Alexander* and its progeny, this Court had repeatedly held that it was neither "appropriate" nor "authorized by law" for a union to waive judicial remedies for the workers it represents. The most reasonable interpretation of the statutes enacting this language is that Congress intended to encourage only *voluntary* use of such ADR techniques.

Other provisions of The Civil Rights Act of 1991 also support the conclusion that Congress endorsed "arbitration" limited to voluntary post-dispute agreements. The Act authorized compensatory damages and punitive damages as new remedies for intentional discrimination in violation of the ADA (and Title VII). Trial of these damage remedies was to be before a jury, if demanded, a right grounded in the Seventh

Amendment. *Hetzel v. Prince William County*, ___ U.S. ___, 118 S.Ct. 1210 (1998).[12]

In the legislative history of the ADA, even before enacting damage remedies and the right to jury trials, Congress clearly stated its intention that the rule of *Alexander* should apply to allow voluntary post-dispute agreements to waive judicial remedies, but *only* post-dispute agreements.[13] The Conference Committee Report explicitly provided:

> It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition could an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 598, cited in *Austin*, 78 F.3d at 881.

Congress' intent to preserve the rule of *Alexander* was explicitly stated in Committee Reports for both the ADA and The Civil Rights Act of 1991:

> The Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment

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[12] "It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII [and the ADA] in 1991 confirmed a right to trial by jury for the first time . . . to have empowered unions in those same amendments to prevent workers from obtaining jury trials in these cases." *Pryner v. Tractor Supply Co.*, 109 F.3d at 363.

[13] See *Nelson v. Cyprus Baghdad Copper Corp.*, 119 F.3d 756, 761-62 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3679 (April 20, 1998), holding that a waiver of judicial remedies by an individual employee has to be "knowing."



> contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act.

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 76-77 (1990). See also, H.R. Rep. No. 40(I), 102d Cong., 1st Sess., 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635. ("This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available."), quoted in part in *Austin*, 78 F.3d at 881-82.

### B. The Federal Arbitration Act does not apply to these collective bargaining agreements.

The Federal Arbitration Act (F.A.A.), upon which this Court relied in *Gilmer*, is inapplicable to the collective bargaining agreements involved in this case.

Section 1 of the Act, 9 U.S.C. § 1, provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce . . . ." Although in *Gilmer* this Court reserved decision on the issue whether that statutory exclusion applied to *"all* 'contracts of employment,'" 500 U.S. at 25-26 n.2, that issue is not presented here[14]: respondents have not argued at any stage of this case that the F.A.A. applies to the agreements, and the court below did not cite the F.A.A. in support of its ruling.

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[14] Settled precedent in the Fourth Circuit has established that the F.A.A. has no application to any collective bargaining agreement, *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Sine v. Local No. 992, Intern. Broth.*, 644 F.2d 997, 1002 (4th Cir. 1981); *United Electrical, etc., Workers v. Miller Metal Products*, 215 F.2d 221, 224 (4th Cir. 1954). The court of appeals adhered to those precedents in *Austin*, 78 F.3d at 879, and 882-83 n.2.

In any event, it is undisputed in this case that petitioner worked in the longshore industry, physically moving goods in interstate and foreign commerce. It is therefore clear as a matter of statutory construction that the collective bargaining agreements here involved are within the exclusion in § 1 of the F.A.A. *See, e.g., Pryner v. Tractor Supply Co.*, 109 F.3d at 357; *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1469 (D.C. Cir. 1997). Consequently, neither the F.A.A. nor *Gilmer* (which relied upon the F.A.A.) provide support in this case for the decision of the court below.

### C. Section 301 of the National Labor Relations Act provides no authority for a union to bind workers it represents to grieve and arbitrate statutory claims.

This Court has declared Section 301, 29 U.S.C. § 185, to be a vehicle for establishing uniform construction of bargaining agreements throughout the nation. The Court's jurisprudence on arbitration under Section 301 has centered on applying the bargaining agreement through a regime of industrial self-government that is created in return for the union's relinquishing the right to strike. Since the beginning, the focus has been virtually exclusively on a uniform system for construing the agreement, and this Court has repeatedly found that Section 301 (and comparable provisions of the RLA) do *not* pre-empt judicial remedies under federal statutes.

Even before this Court's decision in *Alexander*, the Court had found that Section 301 did not require arbitration of a seaman's statutory claim for wages and penalties under 46 U.S.C. §§ 596-597. *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 357 (1971). In *Alexander*, this Court again expressly held that an arbitrator's decision under the bargaining agreement, enforceable under Section 301, was not dispositive of a statutory claim. *See, e.g.*, 415 U.S. at 46 n.6. Instead, this Court unanimously held, 415 U.S. at 59-60:



> . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII.

In *Barrentine*, this Court held that statutory claims under the Fair Labor Standards Act were not resolved by submission of wage claims to a joint industry committee under a bargaining agreement requiring "that 'any controversy' between the parties to the agreement be resolved through the binding contractual grievance procedures." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 736-37 (1981). This Court expressly considered the arguments based on Section 301, 450 U.S. at 734-37, and held that Congress intended that the judicial forum be available for enforcing statutory wage claims, even after the grievance process had reached a binding result on the same claims under the contract.

More recently, in *Gilmer* this Court expressly distinguished the *Alexander* line of cases as *"not* decided under the FAA, which, as discussed above, reflects a 'liberal federal policy favoring arbitration agreements.'" [Emphasis added.] 500 U.S. at 35. That this Court meant to adhere to its prior holding that Section 301 does not require arbitration of federal statutory claims was again confirmed in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), where this Court cited the *Alexander* cases with approval in addressing limits on the scope of pre-emption of state statutory claims by Section 301.

Indeed, *Livadas v. Bradshaw* clearly shows that the scope of the authority to require arbitration under Section 301 is much narrower than the authority under the Federal Arbitration Act. In *Livadas*, this Court held that Section 301 *does not* pre-empt all claims under § 229 of the California Labor

Code when there is an arbitration provision in the applicable collective bargaining agreement. But in *Perry v. Thomas*, 482 U.S. 483, 492 (1987), this Court held that, under the Federal Arbitration Act, the arbitration provision in an applicable securities registration *does* pre-empt all claims under the same § 229 of the California Labor Code.

*Livadas* is simply one of a long line of cases in which this Court has held that state law claims are *not* pre-empted by Section 301 unless the determination of the claim requires a construction of doubtful matters covered by the bargaining agreement. See, e.g., *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988) (state law claim for retaliatory discharge for filing workers compensation claim). As *Livadas* noted, 512 U.S. at 125, this Court has repeatedly held that the union's intent for an arbitration agreement to waive the rights of an individual to a state judicial forum would have to be "clear and unmistakeable." Petitioner's counsel have not found a single case where this Court has ever found an agreement to arbitrate to be a "clear and unmistakeable" waiver of a state law claim.

Similarly, under the Railway Labor Act, this Court has held that the grievance-arbitration process and the National Adjustment Board do not pre-empt federal statutory claims, *Atchison, Topeka & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987) (FELA claims), nor does the mere existence of those RLA remedial procedures pre-empt state law statutory claims. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

Simply put, this Court has never found the judicial remedies Congress created for an individual worker's statutory claim to be foreclosed by a grievance-arbitration procedure that was enforceable under Section 301. The Fourth Circuit's application of the "national policy favoring arbitration of labor disputes" is both unprecedented and unsound. It is one thing for the courts to resolve apparent conflicts in the requirements of the FAA with rights under other federal statutes. It is something



wholly different to abrogate judicial remedies enacted by Congress with a nebulous "national policy favoring arbitration" which has no basis in any applicable federal statute.

### D. The "voluntary and knowing" waiver required by *Alexander v. Gardner-Denver Co.* must necessarily be an individual choice, which cannot be delegated to a union.

As observed in *Barrentine*, Congress has enacted many standards for the protection of workers. These minimum standards of substantive rights cannot be waived prospectively by the worker, nor can such rights be negotiated away by a representative. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). To allow such prospective waivers would completely undermine the public policy reflected by each statute, including the statute at issue here, the Americans with Disabilities Act.

With regard to statutory rights protected by Title VII, this Court emphasized in *Alexander*, 415 U.S. at 51:

> . . . that there can be no prospective waiver of an employee's rights under Title VII. . . . . Title VII . . . concerns not majoritarian processes, but an *individual's* right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that *each employee* be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. [Emphasis added.]

The rights conferred under each of the numerous anti-discrimination statutes regulating employment are *personal* rights, not collective rights. *Compare Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (right to equal

protection is a personal right). Personal rights can only be waived personally, not through a collective representative. Even some rights supporting collective activity under the NLRA may not be waived by a collective representative. *See NLRB v. Magnavox Company.*

In *Alexander*, this Court also discussed a post-dispute waiver of rights under Title VII. This Court observed that, to enforce "any such [post-dispute] waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." 415 U.S. at 52 n.15. This is the appropriate standard to apply to any waiver of rights under employment discrimination statutes, including a pre-dispute waiver of a judicial forum (in those instances where Congress intended to allow such waivers).

The "voluntary and knowing" standard is reflected in the legislative history of the ADA and of The Civil Rights Act of 1991.[15] The "voluntary and knowing" standard is particularly appropriate because the judicial remedies now include a Seventh Amendment constitutional right to a jury trial. *Hetzel v. Prince William County, Virginia*, ___ U.S. ___, 118 S. Ct. 1210 (1998). "[A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Local No. 391 v. Terry*, 494 U.S. at 565.

## CONCLUSION

This Court's decision in *Alexander v. Gardner-Denver Co.* was a correct limitation of the scope of a union's authority and duties. Minimum substantive rights guaranteed to individuals by federal statutes are not the responsibility of the union and the union has no authority to compromise any aspect

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[15] *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299, 1304-5 (9th Cir. 1994) (Title VII); *Nelson v. Cyprus Baghdad Copper Corp.*, 119 F.3d 756, 761 n. 9-10 (9th Cir. 1997) (ADA), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3679 (April 20, 1998).



of those statutory rights. The union here certainly did not agree to compromise those rights, nor to commit the statutory claims of individuals to final and binding resolution in the grievance-arbitration process.

Since 1985, the Court's decisions in the *Mitsubishi* Trilogy approve resolution of statutory claims in commercial arbitration, but these decisions have no application to the grievance-arbitration mechanisms in labor agreements. These procedures in labor agreements still administer an ongoing process of interpretation and application of the private "law of the shop." Commercial arbitration substitutes for litigation when the commercial relation has broken down; labor arbitration addresses the vital rights and obligations in the continuing relation between the parties in order to avoid the disruption of relations that occurs in a strike.

Further, because the labor grievance process is so important to administering the ongoing relations between union and management, the process is not designed to meet the standards by which commercial arbitration can adequately vindicate rights under the statute. Transforming the grievance process to give reasonable assurance that statutory rights would be protected would undermine the usefulness of the grievance process as an extension of collective bargaining.

This case involves a grievance process that is clearly not adequate to vindicate statutory rights, particularly because "grievances" must be asserted within 48 hours, rather than the 180/300 days Congress provided to assert ADA claims. There are many other variations in bargaining agreements, but they all share a central characteristic: they are designed as an extension of collective bargaining, as a substitute for the strike, not as a substitute for litigation. *Alexander*'s "bright-line" rule, that individual statutory claims may be enforced in court, has well served the business community, employees, and the judiciary.

This Court should reaffirm *Alexander* and reverse the judgment below.

Respectfully submitted,

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